91-1646

No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ANTARES AIRCRAFT L.P.,

Petitioner,

—against—

FEDERAL REPUBLIC OF NIGERIA and
NIGERIAN AIRPORTS AUTHORITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the Second Circuit correct in concluding, contrary to all other Circuit courts, that a foreign sovereign's deliberate misappropriation of the sole asset of a U.S. business in the course of its commercial activities did not cause a "direct effect in the United States" within the meaning of Section 1605(a)(2) of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.*, and, accordingly, in depriving the federal courts of subject matter jurisdiction to redress the act of misappropriation?

PARTIES

Petitioner is Antares Aircraft L.P., a limited partnership located in New York.

Respondents are the Federal Republic of Nigeria and the Nigerian Airports Authority. The Federal Republic of Nigeria is a foreign sovereign under the terms of the FSIA. The Nigerian Airports Authority is an instrumentality of the Federal Republic of Nigeria and is therefore considered a foreign sovereign for the purposes of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.*

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On Petition for a Writ of Certiorari
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Petition for a Writ of Certiorari

TO: The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States

REPORTING OF OPINIONS IN THE CASE

The opinion of the District Court dismissing Antares' complaint has not been published in an official or unofficial reporter. The text of that opinion is set forth in Appendix C to this Petition.

The opinion of the Second Circuit affirming the complaint's dismissal is published at 948 F.2d 90 (2d Cir. 1991) (Appendix A hereto).

STATEMENT OF JURISDICTION

Antares seeks review of a judgment of the United States Court of Appeals for the Second Circuit in *Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 948 F.2d 90 (2d Cir. 1991) (Appendix A). Antares' petition for rehearing and suggestion of hearing *en banc* was denied by the Second Circuit on January 13, 1992. (Appendix E). Jurisdiction is based upon 28 U.S.C. § 1254.

STATUTE INVOLVED

The following statute is involved in this petition:

The Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2), which provides, in relevant part, that

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case -- . . .
>
> (2) in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States; . . .

PRELIMINARY STATEMENT

Petitioner Antares Aircraft L.P. ("Antares") respectfully requests that a writ of certiorari be granted in this case to review a decision of the United States Court of Appeals for the Second Circuit, dated October 28, 1991 (the "opinion"), and reported at 948 F.2d 90 (2d Cir. 1991). That opinion affirmed a decision of the District Court for the Southern District of New York (Martin, D.J.) dismissing Antares' complaint against the Federal Republic of Nigeria ("FRN") and one of its instrumentalities, the Nigerian Airports Authority ("NAA"), for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.* Jurisdiction in the district court was based on 28 U.S.C. § 1331 because the case arose out of the FSIA, a law of the United States. *Antares Aircraft, L.P. v. Federal Republic of Nigeria,* 948 F.2d 90 (2d Cir. 1991) (Appendix A), *aff'g* 89 Civ. 6513 (S.D.N.Y. Feb. 26, 1991) (Appendix C) (as yet unreported).

This case presents an issue of critical importance to the protection of U.S. businesses in their conduct of commercial activities overseas. In effect, the Second Circuit ruled that a U.S. company is limited to the courts of a foreign country for redress when that foreign country misappropriates the company's assets -- even if the misappropriation is not an act of state but merely wrongful commerical conduct. In most instances, such a ruling in effect strips U.S. businesses of any meaningful protection against unlawful seizures of their business assets. That is why other courts considering the issue have reached contrary conclusions.

The opinion holds that the direct financial injury to a U.S. business, caused by a foreign sovereign's wrongful commercial conduct directed at a U.S. business, does not constitute a "direct effect in the United States" within the meaning of the FSIA's "commercial activity" exception to sovereign immunity, 28 U.S.C. § 1605(a)(2). Specifically, the opinion rules that Antares suffered a "direct effect" but that this effect was not "in the United States," although Antares is a U.S. company with its sole place of business in New York.

The ruling conflicts with every other Circuit that has considered the question of where a U.S. concern suffers an injury. Those Circuit courts have held that a direct effect incurred by a U.S. concern is in the U.S. for purpose of the FSIA. Thus, the Court of Appeals for the District of Columbia found subject matter jurisdiction under the FSIA where the plaintiff, a U.S. concern, suffered financial injury in the U.S. due to a foreign sovereign's wrongful conduct overseas. *Transamerican Steamship Corp. v. Somali Democratic Republic,* 767 F.2d 998 (D.C. Cir. 1985). The Fifth, Sixth and Eleventh Circuits all agree with the D.C. Circuit: a U.S. concern suffers direct economic injury in the U.S. even if the origin of the injury is overseas.

Inasmuch as the Second Circuit has geographical jurisdiction over New York City, the most important situs of foreign commerce in this country, its refusal, in contrast to other courts,

to provide such protection causes a particularly unfair and chilling impact on companies located there and doing business abroad. Moreover, in addition to this disparate and unfair treatment, the question of whether U.S. companies doing business abroad are to be relegated to the local foreign courts for redress when the local foreign sovereigns misappropriate their assets presents an important issue of international law which should be resolved by this Court.

The opinion sends a signal to foreign governments that the law of this country is in disarray on the critical issue of subject matter jurisdiction over disputes arising out of their commercial mistreatment of U.S. firms. It should not be allowed to stand.

STATEMENT OF THE FACTS

The facts pleaded in this action set forth a deliberate scheme, successfully carried out by NAA and FRN, to hold hostage in Nigeria a commercial aircraft (the "Aircraft") for the purpose of extracting U.S. funds from Antares, the New York-based limited partnership that owns the Aircraft. In January 1989, NAA physically possessed the Aircraft, preventing it from being moved from the tarmac of a Lagos, Nigeria airport, under the pretense that Antares' lessee, Gam Air, owed parking fees. Yet, no matter what steps Antares took to relieve this alleged debt, NAA found excuse after excuse to continue holding the Aircraft.

First, Antares obtained orders from both the High Court of Lagos State, Ikeja Division, and from the United States District Court for the Southern District of New York declaring that Antares owned the Aircraft free and clear of Gam Air's debts. But NAA refused to release the Aircraft. Faced with the rapid deterioration of its sole asset due to the harsh Nigerian weather conditions, Antares acceded to NAA's demands and paid the sums allegedly owed to free the Aircraft. But each time Antares paid the "fees," NAA declared a new fee was owed.

Only one person with knowledge of the underlying facts submitted testimony, J. Nelson Happy, Esq.[1] Mr. Happy submitted an affirmation detailing the deliberate course of the NAA to obtain U.S. funds from Antares by temporarily expropriating the Aircraft. NAA and FRN accomplished this in a classic extortionate manner -- demanding sums of money to permit the Aircraft to leave Nigeria, only to announce new demands once payments were made.

The scheme was carried out over a course of five months and was resolved finally by Antares arranging for a final "final" payment, which was held in escrow in Nigeria until the Aircraft flew off in late May 1989. By that time, Antares had paid more than $100,000 in "fees," and its Aircraft had suffered substantial damage.

Antares subsequently commenced this action. Although NAA and FRN purported not to deny the factual basis of the action, they moved to dismiss on jurisdictional grounds that relied on a different set of facts. In support of their motions, they submitted conclusory affidavits from individuals who lacked personal knowledge of the events. The relevant affidavit submitted by NAA was from one of its "legal advisors," W.C. Madueke, who attested that NAA was a separate legal entity from FRN but did not contest Antares' allegations as to NAA's wrongful conduct. FRN did not submit any affidavits addressing the dealings between Antares, NAA and FRN, but it relied on Mr. Madueke's statement.[2]

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[1] Mr. Happy is an American attorney who travelled to Nigeria on Antares' behalf after the Nigerian authorities took possession of the Aircraft. He represented Antares in dealing with FRN and NAA until the Aircraft was permitted to depart.

[2] On issues not relevant here, NAA also submitted an affidavit of Oluwole Akanle, a professor of law, and FRN submitted two affidavits of its counsel, Doris Shaw, and another of the Director of FRN's Federal Civil Aviation Authority, Mohammed Mashoid Adekunle.

Antares served discovery requests designed to elicit facts concerning subject matter jurisdiction and the ties between FRN and NAA. After receiving several extensions -- and after the motion to dismiss was fully submitted -- both NAA and FRN finally responded by refusing to permit discovery on the basis that the district court lacked jurisdiction.

The district court relied on the Madueke affidavit and dismissed Antares' complaint on the ground that it lacked subject matter jurisdiction over both FRN and NAA. On appeal, the Second Circuit affirmed the district court's decision. The opinion held, in relevant part, that financial injury incurred in the U.S. by a U.S. business due to a foreign sovereign's conduct overseas is not a "direct effect in the United States" pursuant to 28 U.S.C. § 1605(a)(2). This holding contradicts rulings of other Circuits, and this Court should grant a writ of certiorari to correct it.

ARGUMENT

The Opinion Creates a Conflict with Other Circuits and Effectively Overrules the Consistent Rulings of the Second Circuit in Holding that Financial Injury to a U.S. Business Caused by a Foreign Sovereign's Conduct Overseas Does Not Cause a Direct Effect in the United States

The "commercial activity" exception to the FSIA gives a U.S. court subject matter jurisdiction over an action against a foreign state that:

> (2) is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and *that act causes a direct effect in the United States;*

28 U.S.C. § 1605(a)(2) (emphasis supplied).

The opinion recognized that Antares "undoubtedly" suffered a "direct effect" as a result of defendants' activities. 948 F.2d at 95 (App. A7-A8). The opinion also recognized that Antares suffered a direct financial injury in the U.S. as a result of defendants' conduct. *Id.* However, the opinion reached the illogical conclusion that the "direct effect" did not occur "in the United States" because the "legally significant acts giving rise to the claim" took place in Nigeria. *Id.* at 95-96 (App. A8-A10).

This Court should review the opinion because of the inconsistent application of the standard for determining whether a plaintiff business has incurred a "direct effect in the United States." The opinion's conclusion conflicts not only with the ruling of all other Circuits that have considered the issue, but also with every other appellate and district court decision in the Second Circuit that has ruled on the question.

A. The Opinion Creates a Conflict with Every Other Circuit Ruling in Holding that the Direct Effect of Harm to a U.S. Concern Committed Overseas is not "in the United States"

Other than this opinion, every Circuit that has considered the question has held that the direct effect of harm to a U.S. concern caused overseas is "in the United States." The opinion, however, holds that the effect on Antares, though "direct," was not "in the United States" within the meaning of the FSIA. Thus, the opinion creates a direct conflict among the Circuits that can be resolved only upon this Court's review.

In a case with remarkable factual similarities to this one, *Transamerican Steamship Corp. v. Somali Democratic Republic,* 767 F.2d 998 (D.C. Cir. 1985), the U.S. Court of Appeals for the District of Columbia Circuit held that a financial injury arising out of a foreign sovereign's detention of a ship at its port was a "direct effect in the United States" sufficient to confer jurisdiction. There, as here, it was alleged that the foreign sovereign directed that a deposit be made to a specific bank account in the U.S. Yet, in *Transamerican Steamship* the D.C. Circuit found jurisdiction over the foreign sovereign because, even though the relevant misconduct occurred outside the United States, U.S. banking resources were used and the plaintiff experienced foreseeable financial injury in the United States. *Id.* at 1004.

Likewise, the Fifth, Sixth and Eleventh Circuits have recognized that the direct effect of financial injury to a U.S. business abroad is "in the United States." In *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985), the Court of Appeals for the Fifth Circuit expressly found jurisdiction over a foreign sovereign under the FSIA based on financial injury to U.S. citizens residing and conducting business within the U.S. *Callejo* involved a Mexican bank that had breached explicit conditions of certificates of deposits in order to comply with new Mexican government regulations mandating that all deposits in

Mexican banks must be repaid in Mexican pesos. The plaintiffs, U.S. citizens, had purchased certificates calling for payment of principal and interest in U.S. dollars. Significantly, the Court dismissed as irrelevant whether the contract called for payment to the plaintiffs in Mexico or the U.S., stating that "since the Callejos were *located in the United States*, the effects of Bancomer's breach were inevitably felt by them there." *Id.* at 1112 (emphasis supplied).[3]

Similarly, in *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445 (6th Cir. 1988), the Sixth Circuit embraced the concept that financial injury to a U.S. business supports FSIA jurisdiction. *Gould* is among the very few cases that, like Antares' lawsuit, involves allegations of intentional commercial torts abroad by foreign sovereign instrumentalities: the case concerned misappropriation of trade secrets by French companies, which had indirectly utilized those secrets through a joint venture with a Japanese company. *Id.* at 453. Thus -- as was the case in FRN and NAA's extortion from Antares -- the relevant wrongful acts alleged had taken place outside this country. Nevertheless, the *Gould* court resoundingly rejected defendants' contentions that corporate domicile in the U.S. cannot serve as a sufficient basis for a finding that a commercial activity outside the U.S. has had a direct effect in the U.S. After noting that the U.S. concern would suffer financial loss in the U.S. based on the foreign sovereign's conduct abroad, the Court responded:

> [s]urely, this is the kind of claim which Congress intended district courts to adjudicate when brought by American nationals against foreign sovereigns; it is unlikely that Congress intended to create

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[3] In spite of its express finding of FSIA jurisdiction, the Fifth Circuit held that the suit was barred by the act of state doctrine because it called into question the validity of Mexico's exchange control regulations. Such a defense is not at issue here.

> havens abroad for thieves of this country's industrial secrets.

Id. at 453.

Harris Corp. v. National Iranian Radio and Television, 691 F.2d 1344 (11th Cir. 1982), like *Gould* and the *Antares* litigation, also involved a wrongful taking *from* the U.S., rather than a failure to pay money *into* the U.S. There, the Eleventh Circuit considered whether a wrongful demand for payment by a foreign entity under a letter of credit guaranteeing performance by an American corporation caused a "direct effect in the United States." The Court held that it met the jurisdictional standard:

> [t]he letter of credit arrangement -- which was structured according to the wishes of the [defendant Iranian entity] -- extends into this country, and the appellants' demands thus have significant, foreseeable financial consequences here.

Id. at 1351. See also *Ohntrup v. Firearms Center, Inc.*, 516 F. Supp. 1281, 1285-87 (E.D. Pa. 1981) (knowledge that product would be sold in the U.S. satisfied requirement of direct effect clause), *aff'd,* 760 F.2d 259 (3d Cir. 1985).

The difference between *Gould* and *Harris's* strong pro-jurisdiction holdings, on the one hand, and that of the opinion, on the other, demonstrates the seriousness of the conflict among the Circuits concerning the meaning of the phrase "in the United States" in Section 1605(a)(2). Thus, if a U.S. business, harmed overseas by the acts of a foreign sovereign, were to seek relief in the D.C., Fifth, Sixth or Eleventh Circuits, it would likely be able to prosecute its lawsuit to judgment. But if that same business were to bring suit within the Second Circuit, the complaint would be dismissed pursuant to the holding set forth in the opinion. This conflict needs this Court's resolution. *See Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation,* 730 F.2d 195, 203 (5th Cir. 1984)

("for obvious reasons, it is highly desirable to avoid circuit conflicts in the sensitive area of sovereign immunity").

In part, the conflict identified here is due to the larger conflict of how the various Circuits approach the direct effect clause of the FSIA's commercial activity exception. As discussed more fully below, the Second Circuit looks to whether the effect is "sufficiently 'direct' and sufficiently 'in the United States' that Congress would have wanted a U.S. court to hear the case," *e.g.*, *Weltover Inc. v. Republic of Argentina*, 941 F.2d 145, 152 (2d Cir. 1991), (quoting *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 313 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982)), *cert. granted*, __ U.S. __, 112 S. Ct. 858 (1992). By contrast, other Circuits inquire whether the conduct causing the effect is "substantial" and "foreseeable." *See, e.g., America West Airlines v. GPA Group, Ltd.*, 877 F.2d 793, 798-800 (9th Cir. 1989); *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1515 (D.C. Cir. 1988); *Callejo v. Bancomer, S.A.*, 764 F.2d at 1104; *Harris Corp. v. Nat'l Iranian Radio and Television*, 691 F.2d at 1351. *See also* Note, *Interpreting the Direct Effects Clause of the FSIA's Commercial Activities Exception*, 59 Fordham L. Rev. 91 (1990).

This divergence originates in the Second Circuit's decision to discount as "a bit of a non-sequitur" Congress' express direction that the "direct effect" clause be interpreted in accordance with Section 18 of the Restatement (Second) of Foreign Relations Law. *Texas Trading*, 647 F.2d at 311. Several courts outside the Second Circuit have undertaken to harmonize this reference in the legislative history with the text of FSIA and expressed Congressional purpose. *E.g, Zernicek v. Brown & Root, Inc.*, 826 F.2d 415, 417 (5th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988); *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1110-11 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 815 (1983). Nonetheless, the overwhelming impression is one of interpretive disarray. N.J. Evanoff, *Direct Effect Jurisdiction Under the Foreign Sovereign Immunities Act of 1976: Ending the Chaos in the Circuit Courts*, 28 Houston L. Rev. 629, 655 (1991) (Court of Appeals decisions "[fail] to develop any

coherent standard for locating effects" pursuant to the "direct effect" clause). *See also Callejo*, 764 F.2d at 1107 (referring to the FSIA as "a constant bane of the federal judiciary" (quoting *Vencedora Oceanica Navigacion v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 205 (5th Cir. 1984) (Higgenbotham, J., dissenting))).

It is further evidence of this disordered state of affairs that, while the Second Circuit standard has been styled more flexible and permissive of jurisdiction than the "substantial and foreseeable" test, *see* Note, *Interpreting the Direct Effects Clause, supra*, 59 Fordham L. Rev. at 105-06, 111; Comment, *The Foreign Sovereign Immunities Act: Inconsistencies in Application of the Commercial Activity Direct Effect Exception*, 5 Emory Int'l L. Rev. 117, 211, 229-31 (1991), the positions have been reversed in the present action. There is little question but that, in this case, jurisdiction was warranted based on the substantial and foreseeable standard. It cannot be gainsaid that defendants' conduct created substantial harm to Antares.[4] Furthermore, the impact in the U.S. was entirely foreseeable: defendants were dealing directly with an attorney representing Antares over a 5-month period and were fully aware that Antares was a U.S.-based entity. *See Callejo*, 764 F.2d at 1112. Unlike the cases involving unintentional torts, *e.g., America West Airlines, Inc. v. GPA Group, Ltd.*; *Zernicek v. Brown & Root*, 826 F.2d at 418-19, there was no fortuity in the fact that a U.S. person was harmed. Thus, this case bears out the warning of one commentator that "[b]ecause the *Texas Trading* approach offers little real direction . . . it can lead to unpredictable results." Note, *Interpreting the Direct Effects Clause, supra*, 59 Fordham L. Rev. at 106. This Court's review is required to restore the

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[4] The effect on Antares in this case was, first and foremost, financial injury. However, Antares also alleged in the Happy Affirmation at least one additional legally significant act in the U.S. -- namely, that on one occasion defendants demanded that a deposit to be made to a specific bank account in the United States.

predictability in this area necessary for American businesses to operate in the international arena.

Antares respectfully suggests that the petition for a writ of certiorari be granted to review and reverse the opinion's error.

B. The Opinion is Inconsistent with Other Second Circuit Rulings as to the Situs of a "Direct Effect" Within the Meaning of The FSIA

Until this opinion, every decision in the Second Circuit had found that the direct effect of harm to a business occurs, at a minimum, in the place where that business is organized or in its principal place of business, no matter where the harm-causing "legally significant acts" occurred. The illogic and unfairness of the opinion is exacerbated by the fact that, under the ruling at issue here, a foreign company can claim a "direct effect" if it can show financial injury in the U.S., but a local New York business cannot.

Ironically, the opinion purports to base its illogical conclusion on a recent decision of another panel of the Second Circuit, *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 152 (2d Cir. 1991), *cert. granted*, __ U.S. __, 112 S.Ct. 858 (1992).[5] The *ratio decidendi* of *Weltover*, however, conflicts with the ruling in the instant case. The *Weltover* panel began its analysis by recognizing and applying the bedrock principle that a "direct effect" of harm to a business is incurred where that business is located: "[c]learly a foreign sovereign's improper commercial acts cause an effect to the foreign corporate plaintiff in that

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[5] This Court recently heard oral argument in *Weltover* on the issue of whether the foreign sovereign's acts constituted a commercial activity in the U.S. and, if so, whether those acts caused a direct effect in the U.S. No outcome of that appeal will affect Antares' petition. But even if this Court were to affirm the Second Circuit's opinion and reasoning in *Weltover*, the opinion herein requires review, if only because of its inconsistency with *Weltover*. *See infra*.

plaintiff's place of incorporation or principal place of business." *Id.*

The Second Circuit panel in this case fastened on the observation made in *Weltover* that, in determining the situs of a "direct effect," "courts often look to the place where legally significant acts giving rise to the claim occurred." *Antares*, 948 F.2d at 95 (quoting *Weltover*, 941 F.2d at 152). From this, the panel drew the illogical and absurd conclusion that a "direct effect" cannot be sustained by U.S. firms when the claim arose out of wrongful acts taking place in a foreign country. *Id.* at 95-96 (App. A8-A10).

The mere statement of the proposition would seem to carry its own refutation. Not surprisingly, the *Weltover* ruling belies it.

In *Weltover*, the plaintiffs were foreign firms. Thus, there was no question but that a "direct effect" of defendant's actions was incurred in each plaintiff's principal place of business or place of incorporation. Rather, the issue in *Weltover* was whether a "direct effect" of financial loss to a business could *also* be incurred in a place *other* than its principal place of business or place of incorporation. It was only in determining which, if any, *additional* places "a direct effect" should be found that the court in *Weltover* considered the location of the "legally significant acts giving rise to the claim." *Id.*

Weltover is the latest in a long line of cases holding that, as a matter of course, the direct effect of a harm to a business is incurred in that firm's place of business. That basic jurisdictional principle was first articulated in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 312 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982), long recognized in the Second Circuit and elsewhere as one of the leading decisions interpreting the FSIA. There, the court began its analysis of the commercial activities exception by emphasizing that, unlike individuals, business entities by definition "can only suffer financial loss." *Id.* The court found that the direct effect --

financial loss to the plaintiff corporations -- occurred "in the United States" for two independent reasons. One was that "each of the plaintiffs is an American corporation." Second, a legally significant act was to occur in the U.S. *Id.*[6]

Similarly, in *International Housing Ltd. v. Rafidain Bank Iraq*, 893 F.2d 8 (2d Cir. 1989), the Second Circuit reaffirmed the principle that, for purposes of the "direct effect" clause of the commercial activity exception, "an injury to a corporation occurs in some legally significant situs, for instance, *the place of incorporation, or* a place designated for performance of a contract." *Id.* at 11-12 n.3 (citations omitted) (emphasis supplied). Unlike the plaintiff here, both the plaintiffs in *International Housing* were foreign companies. Therefore, as in *Weltover*, the court's inquiry in *International Housing* focused on the alternative analysis of whether the acts giving rise to the claim were "in the United States." Nonetheless, the *International Housing* court took note of the obvious fact that a direct effect occurred where the defendant *benefited* from the payments, that is, "at its situs in Iraq." *Id. at 12.* Thus, *International Housing* again reaffirmed the principle that a direct effect from a commercial injury upon a business is suffered where that business is located.

Until this case, the district courts in the Second Circuit had also uniformly ruled that a direct effect suffered by a U.S.

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[6] The opinion in the instant case purports to rely on two personal injury cases to bolster its conclusion, 948 F.2d at 95, neither of which is remotely opposite. In *Australian Gov't Aircraft Factories v. Lynne*, 743 F.2d 672, 674-75 (9th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985), the Ninth Circuit denied jurisdiction solely on the grounds that the disputed "effects" were not "direct," not that they were not "in the United States." And in *Martin v. Republic of South Africa*, 836 F.2d 91 (2d Cir. 1987), the Second Circuit specifically endorsed the analysis that financial injury to a U.S.-based business occurs "in the United States." *Id.* at 94. Both cases involved personal injuries to individuals who were abroad at the time of the harm. Accordingly, neither case has relevance to a case involving financial injury to a business. This distinction, ignored in the instant case, is basic to the statutory exception from sovereign immunity for "commercial activities". *See, e.g., Texas Trading*, 647 F.2d at 312.

business is *ipso facto* "in the United States." *Crimson Semiconductor, Inc. v. Electronum*, 629 F. Supp. 903, 907 (S.D.N.Y. 1986) (although all legally significant acts took place outside the U.S., FSIA jurisdiction was found "because the breach had a 'direct effect' in the United States, namely, a financial loss suffered by the beneficiary of the contract, a New York corporation"); *Exchange Nat'l Bank of Chicago v. Empresa Minera del Centro del Peru S.A.*, 595 F. Supp. 502, 505 (S.D.N.Y. 1984) (where Peru was situs of legally significant act, subject matter jurisdiction under the FSIA warranted because "[t]he direct effect of defendants' repudiation of the promissory note was clearly felt in the United States where [plaintiff], an American entity, suffered its monetary loss")[7]; *In re Rio Grande Transp., Inc.*, 516 F. Supp. 1155, 1163 (S.D.N.Y. 1981) (direct effect of a tort committed overseas against a U.S. business was "in the United States" within the meaning of § 1605(a)(2) because plaintiff's ship "was the sole source of income of Rio Grande, a New York corporation, and, accordingly, Rio Grande was unable to earn freight or other monies for a considerable period of time after the collision"). *See also L'Europeenne de Banque v. La Republica de Venezuela*, 700 F. Supp. 114, 121 (S.D.N.Y. 1988) ("[e]ffects jurisdiction derives from a state's interest in protecting those within its borders and in governing events within its borders" (quoting Note, *Effects Jurisdiction Under the Foreign Sovereign Immunities Act and the Due Process Clause*, 55 N.Y.U.L. Rev. 474, 512 (1980))).

If the opinion is allowed to stand, all of these decisions are in effect overruled because the "legally significant act" in each occurred outside of the U.S. Thus, the opinion calls for a dramatic but *sub silentio* reversal of the Second Circuit's FSIA jurisprudence that would severely narrow the application of the "commercial activity" exception. Furthermore, as acknowledged

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[7] Although the FSIA requirements for subject matter jurisdiction were satisfied, the court found that personal jurisdiction was lacking.

in *Texas Trading*, such a restrictive interpretation of the direct effect clause would do violence to Congress' announced purpose:

> Courts construing either term ["direct effect" or "in the United States"] should be mindful more of Congress' concern with providing "access to the courts" to those aggrieved by the commercial acts of a foreign sovereign, *House Report* at 6605, than with cases defining "direct" or locating effects under state statutes passed for dissimilar purposes.

Texas Trading, 647 F.2d at 312-13 (citing House Judiciary Comm., *Jurisdiction of U.S. Courts in Suits Against Foreign States*, H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605). Indeed, the legislative history makes clear that Congress' primary purpose in enacting the FSIA was to allow American businesspeople and companies to have access to U.S. courts to resolve business disputes with foreign sovereigns. *See* H.R. Rep. No. 1487, *supra, reprinted in* 1976 U.S.C.C.A.N. at 6605; *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 Before the Subcommittee on Administrative Law and Government Relations of the House Committee on the Judiciary*, 94th Cong., 2d Sess. (1976) at 24-25.

Further, the opinion would lead to wildly anomalous results. In straining to reach the result that it did, the opinion manufactures a dichotomy between business torts and contract breaches. Where a contract is breached overseas, but the contract contains provisions for some performance in the United States, the FSIA's jurisdictional standard may be satisfied -- even where the plaintiff is not a U.S. business. *See Weltover*, 941 F.2d at 151-53; *International Housing*, 893 F.2d at 11. But under the opinion's reasoning, a commercial tort that directly affects a U.S. business can never be the basis of an action under the FSIA as long as it is committed overseas. By the same token, following the opinion's logic, there would be FSIA jurisdiction where a

the same amount of money from the U.S. bank account of the same U.S. corporation.

It is unimaginable that Congress intended the outcome of an FSIA jurisdictional dispute to turn on the question of whether a transaction involved payment to a U.S. bank from a foreign entity or payment from a U.S. bank to such foreign entity. Such senseless distinctions further evidence that the opinion far departs from the accepted and usual course of judicial proceedings and calls for this Court's review.

CONCLUSION

For the reasons set forth above, Antares respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 30—August Term, 1991

Argued Sept. 24, 1991 Decided Oct. 28, 1991

Docket No. 91-7342

ANTARES AIRCRAFT, L.P.,

Plaintiff-Appellant,

—v.—

FEDERAL REPUBLIC OF NIGERIA,
and Nigerian Airports Authority,

Defendants-Appellees.

David F. Dobbins, New York City (Patterson, Belknap, Webb & Tyler, of counsel), for plaintiff-appellant.

Doris K. Shaw, New York City (Warshavsky, Hoffman & Cohen, P.C., of counsel, for defendant-appellee Federal Republic of Nigeria.

David Wippman, Washington, D.C. (Jeffrey Dunoff, Reichler & Soble, Washington, D.C. and James Reichler, White Plains, N.Y., of counsel) for defendant-appellee Nigerian Airports Authority.

Before LUMBARD, WINTER and ALTIMARI, *Circuit Judges.*

ALTIMARI, *Circuit Judge*:

Plaintiff-appellant Antares Aircraft, L.P. ("Antares"), a Delaware limited partnership with its principal place of business in New York, appeals from a judgment of the United States District Court for the Southern District of New York (John S. Martin, Jr., Judge), dismissing its claim against defendants-appellants the Federal Republic of Nigeria ("FRN") and the Nigerian Airports Authority ("NAA") for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976 ("FSIA"). *See* 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1441(d), and 1602-1611 (1988). Antares brought the underlying action to recover damages for the alleged conversion of its aircraft in Nigeria, claiming that the NAA, a Nigerian corporation established pursuant to governmental decree and responsible for the operation and management of all airports in Nigeria, wrongfully detained its aircraft in Nigeria until Antares paid certain airport parking and landing fees that its lessee allegedly owed to the NAA. Antares paid these fees using funds from its New York bank account. Antares attributed the NAA's conduct to the FRN by arguing that the NAA is not truly a separate entity, but is owned and operated by the FRN and is essentially the FRN's agent.

The defendants moved to dismiss the complaint, contending that the district court lacked subject matter jurisdiction under the FSIA because neither the FSIA's "commercial activity" exception, *see* 28 U.S.C. § 1605(a)(2), nor its "expropriation" exception, *see* 28 U.S.C. § 1605(a)(3), applied. The district court granted the motion and dismissed the case. The court reasoned that the "commercial activity" exception did not apply because the alleged conversion of Antares' aircraft in Nigeria did not have a "direct effect in the United States" within the meaning of § 1605(a)(2). Rather, according to the district court, the direct effect of the defendants' conduct occurred in Nigeria where the aircraft was detained and suffered damage from exposure to the elements. The court thus rejected Antares' contention that the

financial loss it suffered as a result of the defendants' conduct overseas was alone sufficient to satisfy the "direct effect in the United States" test of § 1605(a)(2). The court further held that the "expropriation" exception did not apply because the NAA did not conduct any commercial activity in the United States, a necessary element of this exception. *See* 28 U.S.C. § 1605(a)(3).

Antares appeals from the judgment of dismissal, contending, among other things, that the district court erred in finding that the financial loss Antares incurred in the United States as a result of the alleged conversion of its aircraft in Nigeria was not "a direct effect in the United States" within the meaning of § 1605(a)(2) of the FSIA. Antares also argues that the district court erred in determining that Antares failed to allege facts sufficient to conclude that the NAA engaged in commercial activity in the United States, and consequently, in ruling that the "expropriation" exception did not apply. For the reasons set forth below, we affirm the judgment of the district court.

BACKGROUND

Plaintiff-appellant Antares is the owner of a DC-8-55 aircraft, its sole asset. In February 1988, Antares leased the plane to Gam Air, Ltd. ("Gam Air"), a Gambian corporation. Thereafter, Antares assigned its interest as lessor to Expert Air, Ltd. ("Expert Air"), a Nigerian company. Prior to November 1988, both Gam Air and Expert Air apparently defaulted on their respective obligations under these agreements. As a result of Expert Air's default, it appears that Antares regained possession of the aircraft.

In addition to its default, Gam Air also failed to pay the pilots and crew of the aircraft in a timely fashion. In order to recover the wages allegedly due, the pilots and crew of the aircraft commenced an action in Nigeria against Gam Air and Expert Air sometime after November 10, 1988. In connection with that action, a Nigerian court issued an order of

attachment covering the aircraft. At that time, the aircraft was at the Murtala Muhammed Airport in Lagos, Nigeria.

To protect its interest in the aircraft, Antares sought from the Nigerian court, and was granted, the right to intervene as a defendant in the action. Subsequently, the Nigerian court lifted the order of attachment and Antares planned to fly the aircraft to the United States. However, according to Antares, the NAA refused to allow it to remove the aircraft until it paid certain parking and landing fees allegedly incurred by Gam Air and owed to the NAA. Negotiations ensued in Nigeria between Antares' representatives and the NAA concerning the amount of fees due. Antares claims that, in order to regain control of its aircraft, it was forced to make a series of payments to the NAA from January 1989 until May 1989 totaling approximately $100,000. The bulk of these payments were wired from Antares' New York bank account to the NAA's agent in Nigeria. Antares also claims that the NAA directed that one payment be deposited into a California bank account. That account did not, however, belong to the NAA, but apparently belonged to Antares' local Nigerian counsel. In any event, after paying the outstanding parking and landing fees, Antares flew the aircraft out of Nigeria in May 1989.

Five months later, Antares commenced the underlying action against the FRN and the NAA in the United States District Court for the Southern District of New York to recover damages stemming from the detention and alleged conversion of the aircraft in Nigeria. The complaint alleged that the NAA wrongfully detained the aircraft as part of a scheme to extort payments from Antares. While Antares did not claim that the FRN participated directly in this undertaking, it sought to hold the FRN liable on the theory that the FRN owned and operated NAA and that the NAA was, in effect, an agent of the FRN, and not a separate corporate instrumentality.

The defendants moved to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction under the FSIA. Under the FSIA, federal and state courts are without subject matter jurisdiction to entertain an

action against a "foreign state," as defined in 28 U.S.C. § 1603(a), unless the claim falls under one of the statutory exceptions set forth in 28 U.S.C. §§ 1605-1607. *See* 28 U.S.C. § 1604; *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S.Ct. 683, 687, 102 L.Ed.2d 818 (1989); *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1017 (2d Cir. 1991). The parties agreed that the alleged actions qualify as the activities of a "foreign state," and thus the FRN and the NAA were entitled to immunity unless one of the FSIA exceptions applied. The district court dismissed the case after finding, among other things, that neither the "commercial activity" exception, 28 U.S.C. § 1605(a)(2), nor the "expropriation" exception, 28 U.S.C. § 1605(a)(3), applied.

With regard to the "commercial activity" exception, the court found that the detention and alleged conversion of the aircraft in Nigeria did not cause a "direct effect in the United States" within the meaning of the statute. According to the district court, the direct effect of the NAA's conduct occurred in Nigeria where the plane was detained and where it supposedly suffered damage from exposure to the elements. Although the alleged conversion may have caused Antares financial loss in the United States to the extent that it had to pay the parking and landing fees out of its New York bank account, the court concluded that this loss was an indirect consequence of the defendants' activity. The district court thus rejected Antares' claim that the financial loss it suffered in the United States as a result of the defendants' conduct overseas was alone a sufficient jurisdictional nexus to this country to satisfy § 1605(a)(2). The district court observed that the statutory test was not satisfied even assuming, as Antares alleged, that some of the funds transferred to the NAA were first paid into a California bank account (apparently belonging to Antares' Nigerian local counsel) at the NAA's request.

The district court also held that the "expropriation" exception did not apply because Antares failed to allege sufficient facts from which it could be inferred that the NAA conducted "commercial activity in the United States," a neces-

sary element of this exception. *See* 28 U.S.C. § 1605(a)(3). The court pointed out that the NAA had submitted sworn affidavits demonstrating the absence of commercial activity in this country.

Because the district court found that none of the FSIA exceptions applied, it dismissed the complaint against both defendants. This appeal followed.

DISCUSSION

The FSIA provides the sole source of subject matter jurisdiction in cases involving foreign states. *See Shapiro*, 930 F.2d at 1017. Under the FSIA, a foreign state is entitled to immunity from suit unless its conduct falls within one of the statutory exceptions set forth in 28 U.S.C. §§ 1605-1607. *See* 28 U.S.C. § 1604; *Amerada Hess*, 488 U.S. at 434, 109 S.Ct. at 687; *Shapiro*, 930 F.2d at 1017. "When one of these exceptions applies, the foreign sovereign is stripped of immunity, and, pursuant to 28 U.S.C. § 1330(a), subject matter jurisdiction exists in the district court." *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 148 (2d Cir.1991).

It is undisputed that the activities of the NAA and the FRN are those of a "foreign state" within the meaning of the FSIA. *See* 28 U.S.C. § 1603(a)-(b). Therefore, unless one of the FSIA exceptions applies, there is no subject matter jurisdiction in the instant action. Under the FSIA, the foreign state has the burden of proving that it is entitled to sovereign immunity, *i.e.*, that its conduct is not covered by a FSIA exception. *See, e.g., L'Europeenne de Banque v. La Republica de Venezuela*, 700 F.Supp. 114, 119 (S.D.N.Y.1988); *Braka v. Bancomer, S.A.*, 589 F.Supp. 1465, 1467 (S.D.N.Y.1984), *aff'd*, 762 F.2d 222 (2d Cir.1985); *see also* H.R.Rep. No. 1487, 94th Cong., 2d Sess. 7, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6616. For purposes of this appeal, the two relevant exceptions are the "commercial activity" exception, *see* 28 U.S.C. § 1605(a)(2), and the "expropriation" exception, *see* 28 U.S.C. § 1605(a)(3).

A. *The "Commercial Activity" Exception.*

The "commercial activity" exception provides in relevant part that subject matter jurisdiction exists in a case "in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). The parties do not dispute that the NAA's detention of the aircraft in Nigeria and collection of allegedly outstanding parking and landing fees were a commercial activity undertaken as part of its management of the Murtala Muhammed Airport. The primary issue on appeal is thus whether the detention of Antares' aircraft in Nigeria caused a "direct effect in the United States." More precisely, the question presented is whether the effect of the defendants' conduct was "sufficiently 'direct' and sufficiently 'in the United States' that Congress would have wanted an American court to hear the case?" *Weltover*, 941 F.2d at 152 (citation omitted). Antares contends that a direct effect occurred in this country because it suffered economic loss as a result of the aircraft's detention, and was forced to transfer funds out of its New York bank account to free the aircraft.

This Court has not squarely confronted the issue of whether there is a "direct effect in the United States" when an American corporation or partnership suffers a financial loss in the United States as a result of a foreign state's conduct abroad. *See International Hous. Ltd. v. Rafidain Bank Iraq*, 893 F.2d 8, 11 n.3 (2d Cir.1989); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 312 n. 35 (2d Cir.1981), *cert. denied*, 454 U.S. 1148, 102 S.Ct. 1012, 71 L.Ed.2d 301 (1982). In addressing this issue, we must first consider whether the detention of the aircraft caused a sufficiently "direct effect" to Antares. Where, as here, the plaintiff is a legal person, as opposed to a natural person, any injury it incurs is, as a matter of course, financial. *See Weltover*, 941 F.2d at 152; *Texas Trading*, 647 F.2d at 312. "For the financial loss to be 'direct,' the corporate entity must itself be placed in financial peril as an immediate

consequence of the defendant's unlawful activity." *Weltover*, 941 F.2d at 152. Undoubtedly, the detention of Antares' aircraft, its sole asset, for approximately five months had a "direct effect" on Antares. The issue we must consider is whether that "direct effect" occurred "in the United States."

In determining where the effect of a defendant's conduct is felt directly, "courts often look to the place where legally significant acts giving rise to the claim occurred." *Weltover*, 941 F.2d at 152 (citing *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1515 (D.C.Cir.1988) (for there to be a direct effect in the United States, some legally significant event must actually occur here)). For example, in *Weltover*, a foreign corporate plaintiff purchased bonds issued by a foreign state. The plaintiff exercised a contractual option to have the bonds paid in New York. The defendant foreign state failed to make payment when the bonds became due and the plaintiff sued for breach of contract. We were required to determine, among other things, whether the defendants' failure to pay caused a direct effect "in the United States." Eschewing as "too facile" an approach that would limit the effect of a defendant's conduct to the corporate plaintiff's place of incorporation or principal place of business, we held that the direct effect on the foreign plaintiff of defendants' failure to pay on the bonds occurred in the first instance in New York, because "the legally significant act," *i.e.*, defendants' breach of the contract, occurred in New York. *Weltover*, 941 F.2d at 153; *see also Texas Trading*, 647 F.2d at 312 (direct effect of defendant's breach of contract was "in the United States" because the plaintiffs were American *and* because payment was to be made in the United States).

In the instant case, the "legally significant act"—the detention and alleged conversion of the aircraft—occurred in Nigeria. In addition, all negotiations concerning the fees due took place in Nigeria, and the bulk of the payments to the NAA were wired directly to the NAA's agent in Nigeria. Thus, although Antares is an American partnership, the effect of the defendants' conduct abroad was not felt directly "in the United States" but in Nigeria. That is, the direct effect of detaining the plane was, as the district court found, the loss

of the use of the aircraft and the physical damage it suffered *in Nigeria*, and not, as Antares alleges, the financial loss that Antares suffered in the United States. *See Australian Gov't Aircraft Factories v. Lynne*, 743 F.2d 672, 675 (9th Cir.1984) (direct effect of plane crash in Indonesia was in that country, where the plane was destroyed and its functional use lost, and not in the United States where the American corporate plaintiff incurred financial loss as a result of the crash), *cert. denied*, 469 U.S. 1214, 105 S.Ct. 1189, 84 L.Ed.2d 335 (1985); *cf. Martin v. Republic of South Africa*, 836 F.2d 91, 94-95 (2d Cir.1987) (although plaintiff returned to the United States disabled as a result of defendant's conduct in South Africa, the direct effect of that conduct occurred in South Africa, not in the United States). The transfer of funds out of Antares' New York bank account, and the resultant financial loss to the partnership, are not by themselves sufficient to place the effect of the defendants' conduct "in the United States" within the meaning of § 1605(a)(2). *See Gregorian v. Izvestia*, 871 F.2d 1515, 1527 (9th Cir.), *cert. denied*, 493 U.S. 891, 110 S.Ct. 237, 107 L.Ed.2d 188 (1989); *Zedan*, 849 F.2d at 1515.

Antares contends, however, that the effect "in the United States" was not limited to its financial loss. It claims that the NAA directed it to make at least one payment into a California bank account. According to Antares, this contract, in conjunction with its financial loss, places the direct effect of the defendants' conduct in the United States. We disagree.

Even assuming that the NAA directed that a portion of the money be deposited into the American Bank account of a third party, this effect would not alone, or together with Antares' general financial loss, constitute a sufficiently direct effect in this country to satisfy the statute. *See Rafidain Bank*, 893 F.2d at 12 (foreign defendant's direction that money be deposited into its New York bank account does not satisfy "direct effect" test). *But see Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1004 (D.C.Cir.1985) (foreign sovereign's seizure of American vessel overseas causing American corporate plaintiff to transfer large sum of money from its United States bank to foreign

sovereign's United States bank, and causing plaintiff to incur substantial debts in United States, caused direct effect in this country). Thus, absent some legally significant act occurring in this country, the mere financial loss suffered by an American plaintiff, such as Antares, as a result of a defendant's conduct abroad, is by itself insufficient to cause "a direct effect in the United States" within the meaning of § 1605(a)(2) of the FSIA. *See Gregorian*, 871 F.2d at 1527; *Zedan*, 849 F.2d at 1515.

In sum, the NAA's detention of Antares' aircraft in Nigeria, and Antares' subsequent transfer of funds from its New York bank, did not cause a "direct effect in the United States" under § 1605(a)(2). Accordingly, subject matter jurisdiction in the instant case does not exist under the FSIA's "commercial activity" exception.

B. The "Expropriation" Exception.

The FSIA's "expropriation" exception provides that subject matter jurisdiction exists in a case:

> in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. § 1605(a)(3). The district court found that the "expropriation" exception did not apply because Antares failed to allege facts sufficient to support a finding that the NAA engaged in commercial activity in this country. Antares merely asserted to the district court that because the NAA was an international airport authority, it must conduct commercial activity in the United States. In contrast, the court observed that the NAA had submitted in support of its motion to dismiss a sworn affidavit from its legal counsel

that unequivocally stated, among other things, that the NAA did not own or operate any businesses in the United States, held no bank accounts in the United States, and had never purchased goods or services or entered into contracts in this country.

On appeal, Antares argues that the district court erred in finding that the NAA did not engage in commercial activity in the United States. Specifically, Antares claims that the district court improperly credited the NAA's evidence and failed to credit true Antares' allegations concerning the NAA's commercial activity. Antares further argues that the court erred by failing to consider the FRN's commercial activity in this country in determining whether the "expropriation" exception applied. We find Antares' arguments unpersuasive.

On a motion under Fed.R.Civ.P.12(b)(1) challenging the district court's subject matter jurisdiction, the court may resolve disputed jurisdictional fact issues by references to evidence outside the pleadings, such as affidavits. *See, e.g., Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir.1986); *Exchange Nat'l Bank of Chicago v. Touche Ross & Co.*, 544 F.2d 1126, 1130-31 (2d Cir.1976); *Weltover, Inc. v. Republic of Argentina*, 753 F.Supp. 1201, 1203 n. 2 (S.D.N.Y.), *aff'd*, 941 F.2d 145 (2d Cir.1991); *Braka*, 589 F.Supp. at 1468. In the instant case, Antares failed, in either its complaint or in the affidavit submitted in opposition to the defendants' motions to dismiss, to allege any facts that would support an inference that the NAA engaged in commercial activity in the United States. Antares' unsupported assertion to the district court that, by its very nature, the NAA must engage in commercial activity in this country, even if taken as true, *see Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974), is insufficient to support a finding of commercial activity in the face of the NAA's sworn affidavit evidence to the contrary. *See Braka*, 589 F.Supp. at 1468.

Antares next argues that the district court erred in disregarding the FRN's commercial activity in the United States in determining whether the "expropriation" exception applied. According to Antares, the FRN's commercial activity in this

country should have been attributed to the NAA because Antares alleged that the NAA was owned and controlled by the FRN and was, in effect, an agent of the FRN. Antares' argument is unavailing.

First, § 1605(a)(3) specifically distinguishes between when the commercial activity of the "foreign state" is relevant and when such activity of the "agency or instrumentality of a foreign state" is to be considered in determining the existence of subject matter jurisdiction. Under the statute, assuming that rights in property have been taken in violation of international law, then the "expropriation" exception applies if (1) the property taken or any property exchanged therefore "is present in the United States *in connection with a commercial activity carried on in the United States by the foreign state*," or (2) such property "is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality . . . [must] engage[ ] in commercial activity in the United States." 28 U.S.C. § 1605(a)(3) (emphasis added). Although the term "foreign state" encompasses its agencies and instrumentalities, *see* 28 U.S.C. § 1603(a), the reverse is not the case. Since Antares has not alleged that any property at issue is present in the United States in connection with the FRN's commercial activity here, the plain language of the statute focuses the inquiry on, among other things, the commercial activity of the "agency or instrumentality"—here the NAA—and not on that of the FRN. In addition, Antares' claims to the contrary notwithstanding, we see no reason to depart from the general rule that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-27, 103 S.Ct. 2591, 2599-600, 77 L.Ed.2d 46 (1983); *Dayton v. Czechoslovak Socialist Republic*, 672 F.Supp. 7, 10 (D.D.C.1986), *aff'd*, 834 F.2d 203 (D.C.Cir.1987), *cert. denied*, 486 U.S. 1054, 108 S.Ct. 2820, 100 L.Ed.2d 921 (1988).

Moreover, even assuming that the NAA was an agent of the FRN, as opposed to an independent corporate entity, it would be inappropriate to attribute the FRN's commercial

activity in the United States to the NAA for purposes of establishing subject matter jurisdiction under the FSIA based on the NAA's alleged expropriation of Antares' property in Nigeria. Under general principles of agency law, although the jurisdictional contacts of an agent may properly be imputed to the principal, the reverse is not true. *Cf. Gilson v. Republic of Ireland*, 606 F.Supp. 38, 44 (D.D.C.1984), *aff'd*, 787 F.2d 655 (D.C.Cir.1986); *Grove Valve & Regulator Co. v. Iranian Oil Servs., Ltd.*, 87 F.R.D. 93, 96 (S.D.N.Y.1980) (Weinfeld, J.). The district court therefore did not err in refusing to attribute the FRN's commercial activity in the United States to the NAA in determining that the NAA did not engage in commercial activity in this country. Accordingly, the court correctly concluded that it had no subject matter jurisdiction regarding either defendant in this action.

CONCLUSION

We have examined each of Antares' remaining contentions and find them to be without merit. Based on the foregoing, the judgment of the district court dismissing this case for lack of subject matter jurisdiction is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Filed October 28, 1991

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of October, one thousand nine hundred and ninety-one.

PRESENT: HON. J. EDWARD LUMBARD
HON. RALPH K. WINTER
HON. FRANK X. ALTIMARI

Circuit Judges,

ANTARES AIRCRAFT, L.P.,

Plaintiff-Appellant,

—v.—

FEDERAL REPUBLIC OF NIGERIA, and
NIGERIAN AIRPORTS AUTHORITY,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and it hereby is affirmed in accordance

with the opinion of this court with costs to be taxed against the appellant.

ELAINE B. GOLDSMITH, Clerk

By: /s/ EDWARD J. GUARDARO
Edward J. Guardaro,
Deputy Clerk

A TRUE COPY
ELAINE B. GOLDSMITH
/s/ ELAINE B. GOLDSMITH
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

89 Civ. 6513 (JSM)

ANTARES AIRCRAFT L.P.,

Plaintiff,

—against—

FEDERAL REPUBLIC OF NIGERIA, NIGERIAN AIRPORTS AUTHORITY and TOTAL NIGERIA LTD.,

Defendants.

MEMORANDUM OPINION AND ORDER

JOHN S. MARTIN, JR., United States District Judge:

Plaintiff Antares Aircraft L.P. ("Antares"), commenced this action against the Federal Republic of Nigeria ("FRN"), the Nigerian Airports Authority ("NAA") and Total Nigeria Ltd. ("Total Nigeria") to recover damages for the alleged conversion of its aircraft in Lagos, Nigeria.[1] Subject matter jurisdiction in this Court is asserted under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611. Both the FRN and the NAA have moved for an order dismissing the complaint pursuant to Fed.R.Civ.P. 12(b)(1) on the ground that this Court lacks subject matter jurisdiction by virtue of sovereign immunity and on the ground of *forum non conveniens*. In addition, the NAA moves for an order dismissing the complaint pursuant to Fed.R.Civ.P. 12(b)(2) on the

1 Total Nigeria was subsequently dismissed as a defendant in this action by Stipulation of Discontinuance dated April 13, 1990.

ground that the plaintiff lacks personal jurisdiction over the NAA. For the reasons set forth below, the defendants' motion to dismiss for lack of subject matter jurisdiction is granted.

I. BACKGROUND

Antares, a limited partnership with its principal place of business in New York, claims that its aircraft was unlawfully detained by the NAA in Lagos, Nigeria. Specifically, Antares alleges that the NAA, a Nigerian corporation responsible for the operation and management of all airports in Nigeria, wrongfully imposed parking and landing fees upon its aircraft at the Murtala Muhammed Airport; blocked the removal of the aircraft until the parking and landing fees were paid; and refused to deregister the aircraft. Antares claims that it was not until it wired funds from New York to a bank designated by the NAA and later wired funds to the NAA's agent in Nigeria, that Antares finally regained control of its aircraft. Antares does not contend that the FRN took part in the wrongful venture, but seeks to attribute the acts of the NAA to the FRN, alleging that the NAA is owned and operated by the FRN and acts as an agent of the FRN.[2]

II. DISCUSSION

The NAA asserts that as an instrumentality of the FRN, it is entitled to avail itself of sovereign immunity as set forth in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-1611 and thus, the complaint against it should be dismissed. We agree.[3]

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2 The FRN states that the deregistration of the aircraft was performed by the Federal Civil Aviation Authority of the Federal Republic of Nigeria (the "FCAAN"), not the NAA. The FRN concedes that it controls the FCAAN.

3 The FRN argues that because the NAA is a wholly separate juridical entity, its acts cannot be attributed to the FRN. Because we hold today that the NAA is not liable in this action by virtue of sovereign immunity, we need not address the issue of whether the entities are in fact truly separate.

Under the FSIA, foreign sovereigns and their instrumentalities are immune from the jurisdiction of U.S. federal and state courts unless the plaintiff's cause of action falls under one of the specified statutory exceptions set forth in 28 U.S.C. §§ 1605-1607. *Filus v. Lot Polish Airlines*, 907 F.2d 1328, 1330 (2d Cir. 1990). As the parties do not dispute that the NAA is an instrumentality of the FRN as defined in 28 U.S.C. § 1603, the question presented is whether the alleged conduct is encompassed by one of the statutory exceptions to the FSIA. Antares contends that the acts complained of fall into three of the exceptions set forth in § 1605(a). These are, respectively, the commercial activities exception, the expropriation exception and the non-commercial tort exception. As set forth below, none of these exceptions can be invoked here.[4]

A. *Commercial Activities Exception*

§ 1605(a)(2) provides that a foreign state, or its instrumentality, cannot avail itself of immunity under the FSIA when an action against it is based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). As it is conceded that the activities supposedly engaged in by the NAA were commercial in nature, the issue to be resolved is whether the alleged conversion of Antares' aircraft in Nigeria caused a direct effect in the U.S. Antares asserts that the forced transfer of funds from its New York bank account to Nigeria constitutes a direct effect for purposes of the FSIA. In addition, Antares argues that the NAA's purported designation of a California bank account as a depository for the parking and landing fees is a further indication that the direct effects test has been satisfied.

The question of whether payment of money from a U.S. bank account as a result of tortious activity abroad satisfies

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4 The discussion which follows is equally applicable to the FRN, if in fact the refusal to deregister the aircraft was performed by the FCAAN, not the NAA.

the direct effects test remains an open one in this circuit. Although some courts utilize a "substantial and foreseeable" test to facilitate the analysis of what constitutes a direct effect in the U.S., the Second Circuit has not adopted this approach. In *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 313 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148, 102 S.Ct. 1012, 71 L.Ed.2d 301 (1982), the Court determined that a breach of an agreement by the Federal Republic of Nigeria which required payment in the U.S. and caused financial loss in the U.S., was a direct effect for the purposes of the FSIA. In reaching this conclusion, the Court rejected the "substantial and foreseeable" test and instead considered whether the effect was "sufficiently 'direct' and sufficiently 'in the United States' that Congress would have wanted an American court to hear the case." *Texas Trading*, 647 F.2d at 311 n.32, 313. However, as both the breach and the financial loss occurred in the U.S., the Court did not address the issue presented here—whether there is a direct effect when an American corporation injured overseas suffers financial injury in the U.S. *Id.* at 312 n.35.

The Second Circuit again addressed the issue of what constitutes a direct effect in *International Housing Ltd. v. Rafidain Bank Iraq*, 893 F.2d 8, 11-12 (2d Cir. 1989) and held that payment of funds into defendant's bank account in the U.S. upon directions from the defendant did not satisfy the direct effects test. Additionally, the Court concluded that since the plaintiff was not a U.S. corporation, it suffered no direct financial injury in the U.S. The Court expressly declined to address, however, the question of whether financial loss suffered by a U.S. corporation in the United States would, by itself, be sufficient for FSIA jurisdiction. *International Housing*, 893 F.2d at 11 n.3.

However that question might be answered in a breach of contract case including a U.S. plaintiff, in the tort context courts are generally unwilling to find direct effects in the U.S. when the tort complained of occurred outside the U.S. In *Martin v. Republic of South Africa*, 836 F.2d 91, 95 (2d Cir. 1987), the Second Circuit held that an American citizen,

who incurred medical expenses in the U.S. after suffering an injury abroad, did not satisfy the direct effects test. The Court stated that "[u]nlike *Texas Trading*, where no injury was sustained until American companies were denied payment in the United States from a New York bank, the injury to appellant occurred in South Africa where he became quadriplegic." *Martin*, 836 F.2d at 94. Accordingly, since the plaintiff's injury in the U.S. was an indirect consequence of the defendants' actions in South Africa, the Court held that the direct effects test was not met. *Id.* at 95.

Similarly, in the instant action, although the plaintiff may have been financially injured in the U.S., the alleged conversion of the aircraft occurred in Nigeria. Moreover, it is undisputed that the parking and landing fees at issue were incurred at the Murtala Muhammed Airport in Lagos, Nigeria, by a Nigerian registry aircraft, which was flown to Nigeria while under a lease from a Nigerian company. In addition, all communications involving the parties to this action took place in Nigeria, the parties reached an agreement as to the fees in Nigeria and payments for the fees were received by the NAA in Nigeria. Although Antares may have been financially impacted in the U.S. by the forced transfer of funds from its account, this is an indirect consequence of the alleged tortious activity in Nigeria and does not constitute a direct effect under the FSIA.

In support of its argument that the NAA's designation of a California bank as a depository further demonstrates a direct effect under the FSIA, Antares relies primarily upon *Transamerican Steamship Corp. v. Somali Democratic Republic*, 767 F.2d 998 (D.C. Cir. 1985). The Court in *Transamerican* held that a foreign agency's detention of a ship at its port in Somali and demand for payment in the United States were direct within the meaning of the FSIA. The Court found that "[a]t the Agency's insistence, a significant transaction was effectuated in the United States, with an American corporation transferring $28,000 from a New York bank to the Somali government's D.C. bank." *Transamerican*, 767 F.2d at 1004. In light of this strong connection between the activity at issue and the U.S., the Court held that the detention

and subsequent demand were both direct and substantial under the FSIA. *Id.*

This case is readily distinguishable from the case at bar as it has not been established that the NAA either demanded to be paid in the U.S. or actually obtained funds in the U.S. Even if a California bank was designated as a depository for the requested fees, it is undisputed that the bulk of the funds were received by the NAA in Nigeria. Moreover, in reaching its decision, the D.C. Circuit utilized the "substantial and foreseeable" test which has not been employed by this circuit. Clearly, the connection here is not "sufficiently direct and sufficiently in the U.S. that Congress would have wanted an American court to hear the case." *Texas Trading*. Accordingly, the complained of conduct does not suffice to confer jurisdiction under the commercial activities exception set forth in 28 U.S.C. § 1605(a)(2).

B. *Expropriation Exception*

Antares further alleges that the NAA's activities fall under § 1605(a)(3) which provides for jurisdiction if "rights in property taken in violation of international law are in issue and . . . that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3).

This exception does not apply as Antares has failed to establish that the NAA engages in any commercial activity in the U.S. Although it is suggested that the NAA may have commercial ties to this country by virtue of the fact that it is an international airport, this bare allegation is insufficient to support a finding of commercial activity. As stated in the Affidavit of W.C. Madueke, the NAA, which operates exclusively in Nigeria, is neither registered nor licensed to do business in the U.S. and in fact conducts no business in the U.S.; it does not own or rent property in the U.S.; and it does not

buy or sell goods in the U.S. Accordingly, the expropriation exception does not apply.[5]

C. Non-Commercial Tort Exception

Finally, Antares claims that the NAA's activities fall under the exception set forth in § 1605(a)(5) which states in pertinent part that foreign sovereigns, or their instrumentalities, are not immune in actions "in which money damages are sought against a foreign state for . . . damage to or loss of property, occurring in the United States and caused by the tortious act or omission of [a] foreign state. . . ." 28 U.S.C. § 1605(a)(5).

It is well-recognized that for the non-commercial tort exception to apply, the entire tort must occur in the U.S. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 379 (7th Cir. 1985); *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 842 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 881, 105 S.Ct. 247, 83 L.Ed.2d 185 (1984). In *Frolova*, the Court engaged in a lengthy analysis of the statute's legislative history and concluded that "Congress intended that the tortious act or omission, as well as the injury, occur in the United States." *Frolova*, 761 F.2d at 379. In the present case, as it undisputed that the alleged conversion of the aircraft took place in Nigeria and the subsequent financial loss occurred in the U.S., this exception is clearly unavailable.

III. CONCLUSION

In sum, as the alleged activities of the defendants do not fall under any of the statutory exceptions set forth in 28 U.S.C. §§ 1605-1607, the defendants are immune from suit in

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5 Antares argues that if in fact the deregistration of the aircraft was performed by the FRN, not the NAA, this exception is clearly applicable as it is conceded that the FRN engages in commercial activity in the U.S. Although this prong of the exception may be satisfied, it is obvious that a failure to deregister an aircraft is not a taking or expropriation of property. Thus, even if the deregistration of the aircraft was performed under the authority of the FRN, this exception still cannot be invoked.

this Court by virtue of sovereign immunity under the FSIA. Therefore, the defendants' motion to dismiss the complaint under Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction is granted. Accordingly, we need not address the defendants' motion to dismiss on the ground of *forum non conveniens* or the NAA's motion under Fed.R.Civ.P. 12(b)(2) for lack of personal jurisdiction.

SO ORDERED.

Dated: February 26, 1991

/s/ JOHN S. MARTIN, JR.

JOHN S. MARTIN, JR., U.S.D.J.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

89 CIVIL 6513 (JSM)

Filed April 18, 1991

ANTARES AIRCRAFT L.P.,

Plaintiff,

—against—

FEDERAL REPUBLIC OF NIGERIA, NIGERIAN AIRPORTS AUTHORITY ANDEO, TOTAL NIGERIA LTD.,

Defendants.

FINAL JUDGMENT

Defendants Federal Republic of Nigeria ("FRN") and Nigerian Airports Authority ("NAA") having moved to dismiss the complaint pursuant to F.R.Civ.P. 12(b)(1) on the ground that this Court lacks subject matter jurisdiction by virtue of sovereign immunity and on the ground of *forum non conveniens*, in addition, defendant Nigerian Airport Authority having moved to dismiss the complaint pursuant to F.R.Civ.P. 12(b)(2) on the ground that the plaintiff lacks personal jursidiction over NAA, and the said motion having come before the Honorable JOHN S. MARTIN, U.S.D.J., and the Court thereafter on March 1, 1991, having handed down its memorandum opinion and order (#67574); granting defendants' motion to dismiss the complaint under F.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction, it is,

ORDERED, ADJUDGED AND DECREED: That defendants' motion to dismiss the complaint under F.R.Civ.P. 12(b)(1)

for lack of subject matter jurisdiction be and it is hereby granted, and it is further,

ORDERED, that the complaint be and it is hereby dismissed for lack of subject matter jurisdiction.

DATED: NEW YORK, NEW YORK
April 18, 1991

/s/ JOSEPH F. CLOIDT
Acting Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Filed January 13, 1992

Docket Number 91-7342

ANTARES AIRCRAFT L.P.,

Plaintiff-Appellant,

—v.—

FEDERAL REPUBLIC OF NIGERIA, NIGERIAN AIRPORTS AUTHORITY and TOTAL NIGERIA, LTD.,

Defendant-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by

Appellant ANTARES AIRCRAFT L.P.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ ELAINE B. GOLDSMITH

ELAINE B. GOLDSMITH

Clerk